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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 709.

EASTMAN KODAK COMPANY, EASTMAN KODAK COMPANY OF NEW YORK, AND EASTMAN KODAK STORES, INC.,
Petitioners,

vs.

CHARLES B. GRAY, *Respondent.*

SUPPLEMENTAL BRIEF OF PETITIONERS.

WILLIAM H. DAVIS,
GEORGE E. MIDDLETON,
CHARLES W. RILEY,
ALLEN HUNTER WHITE,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Counsel for Petitioners desire to supplement the list of cases cited in support of the third ground advanced for granting certiorari (Petition and Brief, p. 19), by adding the decision of the Circuit Court of Appeals for the Sixth Circuit in *General Motors Co. v. Swan Carburetor Co.*, 44 F. (2d) 24.

In that case, the Circuit Court of Appeals for the Sixth Circuit decided that findings of fact as to the scope of a patent claim, made by the trial judge in an action at law for royalties, and tried without a jury, could not be challenged on appeal as without support in the evidence, or

upon the ground that the undisputed evidence, as a matter of law, required contrary findings, in the absence of a ruling on that specific question obtained during the progress of the trial either by motion for judgment or by a request for a declaration of law, excepted to at the time and preserved for review by a bill of exceptions. In a *per curiam* opinion, the Court said:

> "Under the well-settled practice which we are very often being called upon to apply, we cannot review a finding of fact to see whether it is based on any substantial evidence; nor can we examine any question of law, unless the point was distinctly presented to the court below and ruled upon, during the progress of the trial, and unless proper exception was then taken. City of Cleveland v. Walsh (C. C. A.), 279 F. 57; Fleischmann Const. Co. v. U. S., 270 U. S. 349, 46 S. Ct. 284, 70 L. Ed. 624; Law v. U. S., 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401. If there were any specific questions of fact upon which defendant desired findings, it should have presented them to the court below; if it claimed that any specific finding of fact was not supported by any substantial evidence, it should have excepted specifically upon that ground; a general exceptance to a finding of fact is meaningless. The claim that the findings do not support the judgment is, of course, open on such an appeal; but that cannot avail defendant here. It is found as a fact that the structures in dispute were covered by the contract between the parties, and, as a finding of fact, this is about all that could be said in order to support a judgment for an agreed royalty. Defendant presents the case very much as if it were an equity appeal, but, when the argument is reduced to terms permissible in a law appeal, it comes to saying that, upon the undisputed facts, the court was required as a matter of law to find no liability; but this position cannot be considered by a reviewing court, unless the defendant has upon the trial proceeded by analogy to a motion for a directed verdict. If made at any time before the trial is finished—and perhaps a trial for this purpose continues until the court announces its conclusion—a request for a con-

clusion as a matter of law that there is no evidence to support a judgment would be sufficient to preserve this question for our consideration; but no such request was made, and the matter is not open here. Oyler v. Cleveland, C. C. & St. L. R. Co. (C. C. A. 6), 16 F. (2d) 455; May v. Marbury (C. C. A. 6 Apr. 7, 1930), 39 F. (2d) 438, and cases cited."

It is believed that the foregoing decision is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the instant case.

Respectfully submitted,

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